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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No.

WALTER A. McMULLEN
Petitioner,

v.

COMMONWEALTH OF VIRGINIA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT
OF VIRGINIA

PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

. The decisions of the Virginia Supreme Court rejecting Petitioner's appeal and refusing the Petition for

Writ of Error, Supersedeas and Petition for Rehearing are included in the Appendix, infra.

JURISDICTION

The decision of the Virginia Supreme Court was entered on June 20, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. Whether the refusal by the trial court below to allow Petitioner to waive trial by jury, under the attendant circumstances, denied Petitioner his right to due process and equal protection of the laws in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States.

2. Whether a conviction which lacks the support of any evidence of record constitutes a denial of due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

3. Whether the refusal by the trial court below to grant Petitioner's request for a jury instruction, setting out the requirements for a conviction for conspiracy and distinguishing conspiracy from the mere knowledge of the criminal intention of others, constitutes a denial of due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

4. Whether, if no single error

fatally infects a criminal proceeding, the cumulative effect of a totality of errors destroys the fundamental fairness necessary for constitutional due process of law.

5. Whether Section 54-524.104 of the Code of Virginia, relating to conspiracy to commit an offense under the drug laws, is unconstitutionally vague, uncertain and indefinite in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States.

6. Whether the refusal of the Virginia Supreme Court to follow its own recent decisions and apply the rule of stare decisis denied Petitioner the right of due process and equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same

offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Constitution of the United States, Amendment XIV:

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES INVOLVED

Section 54-524.104 of the Code of Virginia 1950 (1972 Rep. Vol.):

§54-524.104. Attempt or conspiracy. - Any person who attempts or conspires to commit any offense defined in this chapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy. (1970, c. 650)

Section 54-524.106 of the Code of Virginia 1950 (1972 Rep. Vol.):

§54-524.106. Violation for which no penalty specified. - Any person who violates any provision of this chapter, for which no penalty is specified, shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not more than one thousand dollars or shall be confined in jail not exceeding twelve months, or both, at the discretion of the court or jury trying the case. (1970, c. 650.)

STATEMENT OF THE CASE

Petitioner, Walter A. McMullen, is currently incarcerated at the Virginia State Penitentiary, Richmond, Virginia, where he is serving a 20 year sentence for conviction of one count of conspiracy to distribute a controlled drug in violation of Va. Code Ann. §54-524.101

(Repl. Vol. 1972) before the Circuit Court of the City of Virginia Beach, Virginia, on November 2, 1972. On June 20, 1973, the Supreme Court of Virginia denied Petitioner's request for a writ of error and supersedeas to the judgment of conviction. The facts giving rise to Petitioner's conviction, and the Petition herein, are as follows:

On March 17, 1971, an undercover agent of the Virginia State Police went to an apartment in Virginia Beach, Virginia at about 4:00 p.m. The agent had been operating secretly in the Virginia Beach area for some six months, and on that day he went to the apartment in the company of two men, referred to as "Dave" and "Shane".

Upon arrival at the apartment, the three men met Petitioner. The undercover agent, in the six months he had been working in the area, had not heard of and did not know Petitioner. However, the agent initiated a conversation as to where he could obtain drugs and Petitioner told the men that he didn't "have anything" and didn't "know where to get anything". Petitioner was then asked by the agent if he could provide the name of someone who had available drugs (Tr.76).

After some conversation, Petitioner told the agent that he did know of someone who might be able to help the three men (Tr.77) and that for a thousand dollars he might be able to find someone to obtain drugs for them. Petitioner's testimony demonstrates that Petitioner made reference to the thousand dollars

"humorously" (Tr.77). The agent's testimony was that Petitioner stated that he could ". . . turn us on to a quarter of a pound of crystal methadrine for $1,000.00" (Tr.37; see also Tr.38-9).

At 8:30 p.m. on the same date, the undercover agent, together with another agent and the same "Dave" and "Shane", returned to the apartment where Petitioner was with a young girl and two other men (Tr.39). At that time, Petitioner told the agents that he had given a message to a friend, and that the friend might tell other acquaintances, if he saw them, that the "Dave" and "Shane" wanted to see them at the apartment that night (Tr.79). However, none of these others had come to the apartment before that time and no drug transaction was made.

Again, at 10:00 p.m. on the same evening, the agents returned to the apartment and met two acquaintances of Petitioner (a young man and a 16 year old boy), who presumably had received the message from Petitioner's friend (Tr.40). At that time, Petitioner requested that "Those, who are going to deal go in the back bedroom" (Tr.40).

Petitioner did not go into the back bedroom (Tr.55), but remained in the front room with several other people watching television. When the agents did retire to the back bedroom with the two acquaintances, some 23 packets of methanphetamine were purchased for $230.00 by the agents. Petitioner was at no time in the room and in no way participated in the transaction, which was

also true of the other people with Petitioner in the front room of the apartment.

During the entire visit to the apartment by the agents, Petitioner at no time mentioned anything about money or a price for drugs to the agents (Tr.54). In fact, Petitioner said nothing to the agents concerning drugs except the statement "Those who are going to deal go into the back bedroom" (Tr.54).

Throughout the entire time of each visit to the apartment by the agents: (1) Petitioner never offered to sell drugs to the agents himself (Tr.50); (2) Petitioner never offered to give or in any way distribute drugs to the agents (Tr.50); (3) Petitioner never said in any manner to the agents that he himself possessed or had any drugs (Tr.50). Indeed, after the arrest when the apartment was searched nothing in the way of drugs was found in Petitioner's home (Tr.51).

Moreover, the first undercover agent testified that neither Petitioner nor any of the other people in the front room made any effort to come into the back room where the sale took place. Indeed, the testimony of the agent establishes that Petitioner not only never touched or had possession of the drugs but that Petitioner never even had any conversation with the agents at the time of the sale.

There was no direct evidence at Petitioner's trial of participation or interest in the drug transaction, while Petitioner himself denied such interest or participation. Petitioner testified

that after the agent's first visit at 4:00 p.m., that he, Petitioner, made no effort whatever to attempt to obtain any drugs for the agent (Tr.78). Sometime during the afternoon Petitioner and his girlfriend did leave the apartment to go to Petitioner's former residence and check for any misdirected mail (Tr.78). After picking up the mail, Petitioner and his girlfriend went to a drive-in restaurant (Tr.78) where by chance they happened to meet a friend who knew two other acquaintances of Petitioner (Tr.79). Petitioner gave this mutual friend a message that, if he saw the two other acquaintances, to " . . . have them stop over because Shane and Dave wanted to talk to them" (Tr.79).

Petitioner further testified that he "never said anything about drugs or they should have anything on them" or anything of the kind (Tr.79). Petitioner simply gave a message to a mutual friend that "Dave" and "Shane" wanted to see the other two acquaintances.

Petitioner's testimony was in no way contradicted by the prosecution. The first undercover agent testified that he had no knowledge of what Petitioner did after they had their conversation at 4:00 p.m. (Tr.56); that he had no knowledge whether Petitioner arranged the meeting or not (Tr.56); that he would not know whether Petitioner was correct in his testimony that "he just left word with somebody" that Dave and Shane wanted to see them (Tr.56); and he did not deny that it could have occurred in that manner (Tr.56).

Further, there was no evidence and the agent candidly testified that he had no information that Petitioner was in any way to ever receive any of the money for the drugs (Tr.56), or that he was in any way going to handle any of the drugs (Tr. 57).

REASONS FOR GRANTING THE WRIT

I. THE REFUSAL BY THE TRIAL COURT BELOW TO ALLOW PETITIONER TO WAIVE TRIAL BY JURY, UNDER THE ATTENDANT CIRCUMSTANCES, DENIED PETITIONER HIS RIGHT TO DUE PROCESS AND EQUAL PROTECTION OF THE LAWS IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

Petitioner submits that the procedure applied in the trial court below, where Petitioner desired to waive trial by jury and the prosecution refused arbitrarily to "consent" thereto, resulting in a forced jury trial against Petitioner's will -- violated Petitioner's constitutional right to due process and equal protection of the law.

It is a matter of record and general knowledge, of which the trial court and this Court can take judicial notice, that the drug problem, and the dire results and publicity it has received in the City of Virginia Beach, has affected the outlook and thinking of the community. The

prosecution in Virginia Beach has long recognized the likelihood of more severe and harsher punishments, in drug cases, at the hands of a Virginia Beach jury as compared to a Judge sitting alone. For the purpose of eliciting and reaching severe and harsh sentences, the prosecution in Virginia Beach usually elects to refuse to "consent" to waiver of jury trial by defendants in drug cases without assigning or disclosing reasons or justifications therefor. This practice is wholly arbitrary in light of the way in which jury waivers are treated in other felony cases.

Thus, in the instant case, a jury meted out 20 years confinement in the penitentiary and $7,500.00 fine for the alleged participation of Petitioner in contracting two men who actually perpetrated the sale. The two men, who were brought to the bar of justice and dealt with by the Court -- not by a jury of residents of Virginia Beach -- were each convicted, but each only received probation and have and do enjoy freedom from confinement.

On the other hand, Petitioner, who desired to waive trial by jury and to contest any criminal responsibility for his admitted participation in merely "sending a message" to the men who ultimately sold the Schedule III drug, was only able to test that sufficiently on the Commonwealth's arbitrary terms of trial by jury. Indeed, the jury's sentence clearly exceeded what the Court felt was appropriate to the extent of 12 years, as that portion of the sentence was suspended, together

with all of the $7,500.00 fine. However, the court below was understandably reluctant to completely disregard the verdict of a jury, all of which underscores the unfairness of forcing defendants to jury trials in drug cases only.

The net result of substantial incarceration for Petitioner who was lesser involved -- if involved at all -- than the two probationers is inconsistent with the system of justice that must prevail in Virginia and all of these United States.

It is true that the Constitution of Virginia, in Section 8 of the Bill of Rights states:

> "In criminal cases, the accused may plead guilty. If the accused plead not guilty, he may, with his consent and the concurrence of the Commonwealth's Attorney and of the Court entered of record, be tried by a smaller number of jurors or waive a jury. In case of such waiver or plea of guilty, the Court shall try the case."

Apparently, Section 8 of the Bill of Rights was amended in 1928 providing for the trial of a defendant, on a plea of guilty, by the Court with the consent of the accused "and the concurrence of the attorney for the Commonwealth and of the Court". However, the object of the amendment to Section 8 was to expedite the disposition of criminal cases while preserving "every substantial right of the accused".

Petitioner submits that Section 8 of the Virginia Bill of Rights should be construed consistent with the rights and best interests of Petitioner rather than in any way granting the Commonwealth a benefit or advantage in the prosecution of a criminal case. A better construction of the language of Section 8 is that the consent of the prosecuting attorney and the Court to a defendant's waiver of trial by jury is required only if there is suggestion or reason to believe that the defendant's waiver is not intelligent, knowing and voluntary. In other words, it is apparent that concurrence by the prosecutor and/or the tribunal was never intended to infringe upon the fairness of a defendant's trial and his right to due process of law. Instead, Section 8 was only intended to supplement and support that right if, in fact, defendant's waiver was not directly his voluntary act.

Thus, Section 19.1-192 of the Code of Virginia as amended, which repeats the provision as to a waiver of trial by jury in a felony case by the accused "with the concurrence of the attorney for the Commonwealth and the Court entered of record" should similarly be construed to provide the Commonwealth with the right to withhold its concurrence only under circumstances of further protection for the rights of the defendant rather than in derogation thereof.

The new American Bar Association Standards for Criminal Justice, which are rapidly finding universal acceptance, treat this problem in Standards Relating to Trial by Jury. The commentary to

Section 1.2 of said Standards stated that:

> "A more difficult question is whether waiver of jury trial by defendant should be viewed as a matter of right or whether such waiver should be conditioned upon the consent of the Court or the approval of the prosecuting attorney. The jurisdictions which permit waiver in at least some cases are divided on this issue. A total of 17 states allow the defendant to waive a jury without approval, 7 require only the consent of the Court, 11 require consent of the prosecution, and 9 require the consent of both, which is a position taken in Fed. Law. Crim. P. 23(a). Note, 51 Cornell L.Q. 339, 343 (1966). In Singer v. United States, 380 U.S. 24 (1965), the Supreme Court held that the restrictions on waiver in the Federal rule did not violate the Constitution. The language of the decision indicates that it would also be constitutionally permissible to grant the defendant an absolute right to waiver, contrary to some dictum in Patton which had indicated otherwise. Patton v. United States, 281 U.S. 276, 312 (1930)." ABA Standards, Trial by Jury §1.2 at 29.

The Commentary, thereafter indicates and sets out the arguments for both views, but with this note:

> "A summary of these arguments is presented below. It should be noted, however, that the Advisory Committee on Fair Trial and Free Press has taken the view that a defendant should have an absolute right to waive a jury when 'there is reason to believe that, as a result of the dissemination of potentially prejudicial material, the waiver is required to increase the likelihood of a fair trial.'" See ABA Standards, Fair Trial and Free Press, Section 3.3 at 30 (approved draft, March 1968).

And, again, the Standards relating to trial by jury under circumstances such as those in the case at bar:

> "B. Importance of Fair and Impartial Trial. The right of a defendant to a fair and impartial trial should carry with it the unconditional right to waive jury trial. This theory is fully developed in the following excerpt from NEW YORK JUDICIAL COUNCIL, FIFTH ANNUAL REPORT 167 (1939):
>
> There will undoubtedly be many cases in which a defendant will deem it necessary to waive jury trial in order to obtain an impartial hearing. Cases of this kind are those involving sex

offenses, and those which have received sensational press notice. He may similarly feel the need for trial by a judge where technical fact situations are involved, such as in a prosecution for embezzlement. Rules of evidence which are strictly adhered to before a jury need not be followed closely when the trial is by the court alone. This results in a full disclosure of facts and allows for a just decision being reached. Moreover, there may be something in the past life, reputation or appearance of the defendant, calculated to arouse prejudice against him in the minds of a jury. Thus, there are many cases today in which a defendant fails to take the stand in a trial before a jury in order that he may not be prejudiced in the eyes of the jury by having his past criminal record exposed by the prosecutor on cross-examination.

See Handley, Waiver of Jury in Criminal Cases -- Some Observations, 1 Tex.L.Legis. 45,50 (1947); Scott, Waiver of Jury Trial in Felony Cases -- Colorado Law, 23 Rocky Mt.L. Rev. 334,335 (1951); 14 Mo.L. Rev. 185, 189 (1949). The usual devices for countering prejudiced jurors -- continuance, change of venue, and voir dire examination -- may

be ineffective on account of widespread community hostility and a defendant should have an absolute right to a bench trial. WAIVER OF JURY TRIAL IN CRIMINAL CASES IN OHIO 22 (1933); Donnelly, Defendant's Right to Waive Jury Trial in Criminal Cases, 9 U.Fla.L.Rev. 247, 254 (1956); ORFIELD CRIMINAL PROCEDURE FROM ARREST TO APPEAL 75 (1947); Note, 65 YALE L.J. 1032, 1041 (1956); 38 TEX.L. Rev. 927, 930 (1960).

Thus, Petitioner in the instant case submits that where the Commonwealth advanced no reasons or justifications for an arbitrary refusal to consent to waiver of jury trial by the defendant; where there was no suggestion that the defendant was requesting waiver without full, complete, knowing and intelligent action; where there was evidence that the jury trials in the City of Virginia Beach in drug cases had been and were resulting in far more severe and harsh verdicts against defendants than trials by the Court; (See refused exhibit of Court orders and newspaper clippings marked September 28, 1972 in the record, and newspaper article dated September 21, 1972, reprinted in Appendix hereto.) where the prosecution, before the trial of the case, was willing to enter a plea bargaining understanding for a five year suspended sentence (September 28, 1972, Tr.45); and where the result of the jury trial was excessive punishment as indicated by the Court's action thereafter, suspending the

largest part thereof, it is submitted that arbitrary refusal of the Commonwealth to "consent" to waiver of trial by jury by the defendant constituted a denial of due process and equal protection of laws as mandated by the Constitution of the United States.

In Singer v. United States, 380 U.S. 24 (1965), this Court said:

> "In upholding the validity of Rule 23(a), we reiterate the sentiment expressed in Berger v. United States, 295 U.S. 78, 88, that the Government attorney in a criminal prosecution is not an ordinary party to a controversy, but a 'servant of the law' with a 'twofold aim . . . that guilt shall not escape or innocence suffer.' It was in light of this concept of the fole of prosecutor that Rule 23(a) was framed, and we are confident that it is in this light that it will continue to be invoked by Government attorneys. Because of this confidence in the integrity of the Federal prosecutor, Rule 23 (a) does not require that the Government articulate its reasons for demanding a jury trial at the time it refuses to consent to a defendant's proffered waiver. Nor should we assume that Federal prosecutors would demand a jury trial for an ignoble purpose.

> We need not determine in this case whether there might be some circumstances where a defendant's reasons for wanting to be tried by a judge alone are so compelling that the Government's insistance on trial by jury would result in the denial to a defendant of an impartial trial. Petitioner argues that there might arise situations where 'passion, prejudice . . . public feeling' or some other factor may render impossible or unlikely an impartial trial by jury. However, since petitioner gave no reason for wanting to forego jury trial other than to save time, this is not such a case, and petitioner does not claim that it is." 380 U.S. at 37 (emphasis supplied)

While in Singer, this Court found significance in the petitioner giving "no reason for wanting to forego jury trial", Petitioner here was far more direct and specific. Petitioner has always assigned the recognized severity of jury outlook and punishment in Virginia Beach as his reason for desiring to forego jury trial. The prosecution has assigned no other reason for requesting a jury trial.

The above language of Singer is indeed a "caveat" to the general proposition and has been so termed by at least one court. Gaulke v. State, 184 N.W. 2d 599 (Minn.1971).

Finally, the problem of compulsory trial by jury, at the insistance of the prosecution, is common to at least ten other state jurisdictions besides Virginia. ABA Standards, Trial by Jury §1.2 at 29 (Approved Draft, March 1968). This Court has not addressed the problem since the decision in Singer, where the defendant's reasons for wanting to waive jury trial were not compelling. Petitioner in the instant case has clearly demonstrated compelling reasons for his desire to be tried by a judge alone. The problem is, thus, squarely before this Court, and Petitioner respectfully urges that this Court make a definitive ruling.

II. PETITIONER'S CONVICTION LACKS THE SUPPORT OF ANY EVIDENCE OF RECORD, THEREBY DEMONSTRATING A DENIAL OF DUE PROCESS OF LAW IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

A. An allegation that no evidence of record can support a finding of guilt is an allegation of a denial of due process.

This Court has long considered an essential guarantee of procedural due process is that an accused is presumed innocent until proved to be guilty, beyond a reasonable doubt, of every fact necessary to constitute the crime with which he is charged. In re Winship, 397 U.S. 258, 362-364 (1969). When a criminal

proceeding has run its course and there exists no evidence of record which can, as a matter of law, support a finding of guilt, due process of law demands that the accused go free. Thompson v. Louisville, 362 U.S. 199 (1960); Shuttlesworth v. Birmingham, 382 U.S. 87 (1965); Gregory v. Chicago, 394 U.S. 111 (1969). Petitioner submits that the record of his trial is devoid of evidentiary support that he performed the acts or committed the crime for which he stands convicted.

Notwithstanding the factual situation itself, the only direct evidence offered in proof of guilt was the testimony of an undercover agent of the Virginia State Police. The agent testified that, before any type of drug transaction, Petitioner requested that "Those who are going to deal go into the back bedroom" (Tr.40). Admitting the veracity of this testimony, it would establish only that Petitioner consciously sought to extricate himself and the other innocent parties in the living room from any participation, actual or implied, in any criminal acts. Petitioner was obviously unaware of the official function of the undercover agents at that time; there was nothing to warn Petitioner against participating in the drug transaction if he had wanted to do so. Thus, Petitioner's actions were wholly exculpatory. Indeed, this evidence wholly negates an essential element of the crime which Petitioner was charged. In order to be guilty of the kind of conspiracy denounced by Virginia Code §54-524.104, an accused must be proved, beyond a reasonable doubt, to have entered into an existing agreement with

others to distribute drugs by some concerted action. Reed v. Commonwealth, 213 Va. 593, 594 (1973); see also, Smith v. Commonwealth, 212 Va. 662, 187 S.E.2d 205 (1972). That Petitioner expressly requested the participants in the drug transaction to leave his presence would establish the impossibility of his having agreed or acted in concert with them.

The summary effect of all prosecution evidence of record establishes only that which herein stands admitted: the corpus delicti (a drug sale by others). The record of trial is void of any direct evidential support for the actus reus (agreement and concerted action) or the mens rea (desire or intent to agree or act). It must therefore follow that Petitioner's guilt was inferred from the circumstances surrounding the drug transaction or from "guilt by association".

Factual situations which invite suspicion, conjecture and speculation do not evidence proof of guilty beyond a reasonable doubt, for a conviction of any criminal offense cannot be sustained on the basis of suspicion or surmise. Curley v. United States, 160 F.2d 229 (D.C. Cir. 1947), cert. denied, 331 U.S. 837 (1947). The circumstances in evidence at Petitioner's trial do not provide a substantive basis for any permissible inference of guilt. When the prosecution relies on circumstantial evidence to meet its burden of proof, it is well recognized that the trier of fact is bound by the standard of reasonable men as to the inferences derivable therefrom. The evidence of record must, as a matter of law, exclude every

reasonable hypothesis of innocence before reasonable men may permissibly infer guilt beyond a reasonable doubt. Grantello v. United States, 3 F.2d 117 (8th Cir. 1924); 9 J. Wigmore, Evidence §2497 (3rd Ed. 1940).

However, when the prosecution fails to produce any evidentiary support for the very act and elements of the crime alleged it is patently impermissible, a fortiori, for reasonable men to infer any hypothesis of guilt.

At Petitioner's trial the prosecution established only that Petitioner knew the participants in a drug transaction which occurred in the same apartment, though out of his presence. It is well established that one is not proved guilty of a crime merely by evidence of his being present in a given place under given circumstances. Thompson v. Louisville, 362 U.S. 199 (1960). In the instant case, Petitioner was lawfully present in an apartment and he in no way saw, touched or discussed the drugs being sold in the back room or the money given in exchange therefor. These facts alone constitute the extent of the prosecution's proof and do not provide sufficient nexus for any reasonable inference of guilt.

Thus, Petitioner does not ask this Court to base it's decision on the sufficiency of the evidence, but rather on the time honored principle that a conviction which rests on no evidence at all is void for lack of due process of law. Thompson, supra.

B. The trial court refused to grant an instruction setting out the distinction between conspiracy and mere knowledge of the criminal intention of others, thereby holding Petitioner to absolute liability for mere knowledge alone.

Instruction 7A, offered by Petitioner but refused would have told the jury:

> "The Court instructs the Jury that where the Commonwealth charges that the defendant is guilty of conspiracy, the burden rests upon the Commonwealth to prove that there was a conspiracy of two or more persons who did agree to some concerted action to accomplish some crimnal unlawful act. Mere knowledge that another person threatens the commission of a crime is not sufficient to make one a conspirator in the crime." (Italics Ours)

The instruction was a proper statement of applicable law. See Krulewitch v. United States, 336 U.S. 440, 447-8 (1949) (Jackson, J., concurring); United States v. Kissel, 218 U.S. 601, 608 (1910) (Opinion by Holmes, J.). The detriment to Petitioner in its refusal was a failure of the trial court to advise the jury on a pertinent principle that was particularly appropriate to the facts at bar. This principle was set out in the last sentence of the instruction (italicized above) distinguishing mere knowledge by one that others intended the commission of a crime from criminal conspiracy.

It is evident that Petitioner had knowledge of what was probably going to transpire when the others went into the back room; that, however, did not render him criminally responsible and in absence of the jury being instructed as to this principle, which is not universally recognized by laymen, Petitioner was prejudiced. The Court should have granted the instruction. It did not address itself to that principle in any of the other instructions that were granted.

Without the above instruction, the jury was free to presume the ultimate fact of Petitioner's guilt from his mere knowledge of the drug transaction. Such a presumption is not unlike the statutory presumptions condemned by this Court in United States v. Romano, 382 U.S. 136 (1965) (presumption of possession of illegal still from mere fact of presence at such still), and Leary v. United States, 395 U.S. 6 (1969) (presumption of knowledge of illegal importation of marijuana from mere fact of possession of such marijuana). The statutory presumptions in Romano and Leary were held to be violations of due process because they failed to meet the test originally set forth by this Court in Tot v. United States, 319 U.S. 463 (1943):

> Under our decisions a statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of

connection between the two in common experience. 319 U.S. at ____.

While the presumption in the instant case resulted from inadequate jury instructions, instead of an intentional statutory instruction, the result was no less prejudicial to the accused. Petitioner was found guilty on nothing more than the showing that he knew others were selling drugs in a back room. There is nothing in common experience to justify the presumption that such knowledge made Petitioner a co-conspirator in the drug transaction. The jury should have been so advised.

Petitioner therefore submits that his conviction was without basis in law or fact. Such conviction could only have been based on a standard markedley inferior to the reasonable doubt standary necessary for due process of law.

III. EVEN IF NO SINGLE DEPRIVATION FATALLY INFECTED PETITIONER'S TRIAL, AN EXAMINATION OF THE RECORD TOGETHER WITH A CONSIDERATION OF THE CIRCUMSTANCES SURROUNDING THE TRIAL ESTABLISHES THAT PETITIONER WAS SUBJECTED TO A PROCEEDING WHICH HAD BECOME BENT ON FIXING GUILT

This Court has long held that any criminal proceeding which fails to accord an accused citizen a fair hearing violates even the most minimal standards of

due process. Turner v. Louisianna, 379 U.S. 466 (1965); Irvin v. Doud, 366 U.S. 717 (1961); Lisenba v. California, 314 U.S. 219 (1941). Justice often demands that this Court intervene to protect a petitioner whose conviction was the product of the atmosphere surrounding his trial, even though the trial itself may have been formally correct. Moore v. Dempsey, 261 U.S. 86 (1922). Petitioner submits that the overall picture presented by the record in the instant case is offensive to the concept of fundamental fairness.

The integrity of Petitioner's trial, measured by constitutional standards, was seriously undermined from its inception. The prosecution arbitrarily refused to consent to Petitioner's waiver of trial by jury, preferring instead to subject Petitioner to the community's recognized harshness in dealing with drug users, regardless of the offense charged. (See Arg. I. supra). The trial judge took no steps to protect the trial from the probability of prejudice, in the face of repeated irrelevant questions by the prosecution, asking Petitioner about his past use of drugs and his knowledge of "speed" (Tr.95). When Petitioner's counsel sought a jury instruction, properly setting out the distinction between conspiracy and mere knowledge of the criminal intention of others, such instruction was refused, leaving the jury to presume guilt from mere knowledge alone (see Arg. II.B. supra).

That the above deviations from specific constitutional safeguards substantially prejudiced Petitioner is

established by the injustice of the conviction itself. The palpably inadequate evidence upon which the conviction stands reflects the effect of the failure to adhere to those protections (See Arg. II. A., supra). Petitioner was found guilty on not much more than the fact that the Commonwealth brought charges against him and the showing that he was present, though in another room, on the night of the drug transaction.

What the foregoing discloses is not a mere accumulation of random errors, but a flaw pervading the entire procedure. The judgment of a court, to be sure, carries with it the presumption of regularity. In re Cuddy, Petitioner, 131 U.S. 280 (1889). However, it is submitted that a presumption of fairness is no longer viable in the case at bar. The finding of guilt, especially in contrast with the evidence, should be viewed as the inevitable judgment of a body that had succumbed to the pressures brought upon the community to "do something" about the drug problem.

As with countless other suburban communities, the drug problem that has developed amongst young people in the City of Virginia Beach has caused great anguish and anxiety. Responsibility for the sale of the dangerous drugs had to be established; Petitioner takes no issue with that necessity. What is contended, however, is that Petitioner's trial, once initiated, became a policy instrument in the hands of his accusers, whereby the wrath of the community was directed against Petitioner alone. Use of a criminal trial for an ulterior motive is inherently

suspect because of the danger that the accused's guilt or innocence will be at issue in form only. See Estes v. Texas, 381 U.S. 532, 575 (1965) (Warren, C.J., concurring) (Discussing the Soviet Union's trial of Francis Gary Powers, the U-2 pilot). Petitioner contends that the real issue at his trial was whether the community would continue to tolerate an admitted drug user, regardless of the fact that he was charged only with the distinct offense of conspiring to sell drugs. In the rush to prove the negative of that issue, Petitioner had merely become a pawn.

Petitioner does not seek a blanket indictment against the City of Virginia Beach. Nor does Petitioner contend that all prosecutions for drug offenses are inherently unfair. What is constitutionally guaranteed to Petitioner is that judicial procedures will be applied to him in a fundamentally fair way. This Court need only find that the record and circumstances surrounding Petitioner's conviction would void this particular trial as lacking due process of law.

Mr. Justice Holmes, in his oft-quoted dissent in Frank v. Mangrum, 237 U.S. 309 (1915), urged this Court to review a conviction in which the petitioner had alleged mob domination:

> This is not a matter for polite presumptions; we must look facts in the face. Any judge who has sat with juries knows that in spite of forms they are extremely likely to be impregnated by the environing atmosphere.

237 U.S. at 349.

Eight years later, Mr. Justice Holmes wrote for the majority in holding that review was proper when,

> . . . [T]he case is that the whole proceeding is a mask -- that counsel, jury, and judge were swept to take fatal end by an irresistable waive of public passion, and that the State Courts have failed to correct the wrong . . . . Moore v. Dempsey, 261 U.S. 86, 91 (1923).

While Petitioner cannot point to anything as overt as mob violence, he contends that the pressures surrounding his trial were no less prejudicial in their ultimate effect on the verdict. This Court should give Petitioner the opportunity to establish his claim of fundamental prejudice.

IV. SECTION 54-524.104 OF THE CODE OF VIRGINIA, RELATING TO CONSPIRACY TO COMMIT AN OFFENSE UNDER THE DRUG LAWS, IS VAGUE, UNCERTAIN AND INDEFINITE IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

A. The offense itself is not defined with sufficient definiteness.

Petitioner was tried on the charge

of "conspiracy to distribute a controlled drug" in violation of Virginia Code Ann. §54-524.104 (Repl. Vol. 1972). In an effort to define Petitioner's alleged offense the trial court below instructed the jury as follows:

> The Court instructs the jury that conspiracy is a combination of two or more persons to combine or agree by a concerted action to accomplish some criminal or unlawful purpose. (Tr.135)

The origin of the above definition was not explained by the trial court, but it is clear that no such definition of "conspiracy" ever appeared in §54-524.104, as that statute was worded at the time of Petitioner's trial. Quite the contrary, §54-524.104, despite several amendments, has never contained the slightest hint of a definition or explanation of the elements or conduct constituting the crime of "conspiracy". Instead, the Section merely states that:

> Any person who attempts or conspires to commit any offense defined in this chapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

It is true that the trial court's instruction approximates the definition for the common law crime of conspiracy in

in Virginia. Crump v. Commonwealth, 84 Va. 927, 6 S.E. 620, 10 Am.St.Rep. 895 (1888); 4 Michie's Juris., Conspiracy §2 (1949 and Supp. 1973). However, Petitioner was not indicted and tried for common law conspiracy, nor was the offense Petitioner allegedly conspired to commit (distribution of a controlled drug) a common law offense.1/

Indeed, virtually all drug related offenses in Virginia, including "conspiracy" under §54-524.104, are wholly statutory. Va. Code Ann. §54-524.1 et seq. (Repl. Vol. 1972 and Supp. 1973). Moreover, all of these drug related offenses, with the exception of "conspiracy" under §54-524.104, are defined and explained in great detail within the body of the statutes themselves. Id.

Thus, "conspiracy" under §54-524.104 appears as an unique criminal offense without either a statutory or common law definition. Inasmuch as there is no

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1/ There is a general criminal conspiracy statute in Virginia which enbodies the common law offense of "conspiracy to commit felony". Va. Code Ann. §18.1-15.3 (Supp. 1973). However, subsection (d) of §18.1-15.3 expressly prohibits any application of this general statute to the statutory (non-common law) offenses set out in Chapter 15.1 (§54-524.1 et seq.) of Title 54 of the Virginia Code.

definition for the offense, the law can only be arbitrarily made on a case by case basis. Petitioner submits that the elements of the offense are, therefore, so vague, indefinite and uncertain that it should not be enforced as a criminal offense in Virginia. See Ashton v. Kentucky, 384 U.S. 195 (1966).

This Court has cogently summarized the reasons for refusing to enforce a penal statute which fails to define the offense condemned therein:

> No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids. The applicable rule is statuted in Connally v. General Constr. Co., 269 U.S. 385, 391, 70 L.Ed. 322, 328, 46 S.Ct. 126: "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application,

violates the first essential of due process of law." Lanzetha v. New Jersey, 306 U.S. 4, 453 (1939); see also Edwards v. South Carolina, 372 U.S. 229, 236-238 (1963); Cox v. Louisianna, 379 U.S. 536, 551-552 (1965); Amsterdam, "The Void for Vagueness Doctrine in the Supreme Court", 109 V.Pa.L. Rev. 67 (1960).

Petitioner submits that this same reasoning should be applied to Va. Code Ann. §54-524.104 (Repl. Vol. 1972), in holding that Petitioner's prosecution thereunder is void for lack of due process of law.

B. It is impossible to determine whether the offense is a felony or a misdemeanor.

Petitioner was charged with conspiracy. He was not charged, of course, with the substantive offense of distribution or sale of a dangerous drug.

Under Virginia's Drug Control Act, Chapter 15.1 of Title 54 of the Code of Virginia (1950), the only provision for "conspiracy" is found in Section 54-524.104 which (at the time of Petitioner's conviction) stated that:

> Any person who attempts or conspires to commit any offense defined in this chapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the

commission of which was the object of the attempt or conspiracy.

It is apparent that no specific punishment is provided; rather, the statute speaks in terms of what the maximum punishment may be. For example, Va. Code Ann. 54-524.101.1(a) (Repl. Vol. 1972) provides a specific punishment, within a framework of minimum and maximum amounts, viz., ". . . imprisoned for not less than five nor more than forty years and fined not more than twenty-five thousand dollars, and imprisoned for not less than one nor more than ten years or, in the discretion of the jury or the court trying the case without a jury, by confinement in jail not exceeding twelve months and fined not more than one thousand dollars".

In treating those instances under Virginia's Drug Control Act where no specific punishment was set out, the General Assembly, in Section 54-524.106 stated:

> Any person who violates any provision of this chapter, for which no penalty is specified, shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not more than one thousand dollars or shall be confined in jail not exceeding twelve months, or both, at the discretion of the court or the jury trying the case.

It is obvious that the Legislature provided a specific punishment where it

desired, thereby specifying the grade of the offense, viz., whether the offense was a felony or a misdemeanor. As per the provisions of 54-524.106, supra, in those cases "for which no penalty is specified", all prohibited acts for which the General Assembly provided no specifics were to be grouped and classified as misdemeanors.

Webster's Dictionary defines "specific" as: "to mention, describe, or define in detail: state definitely . . . ." However, Section 54-524.104, in providing only a maximum punsihment, in no way specifies the penalty for "conspiracy". One does not even know whether it is felony or misdemeanor or what the minimum punishment is.

Thus, the fatal defect in §54-524.104 is the vague, uncertain and indefinite provision for punishment.

In Hancock v. Cox, 212, 183 S.E.2d 149 (1971), the court, applying time honored guidelines, held unconstitutional a statute which was likewise vague, uncertain and indefinite as denying due process of law for lack of certainty of the definition of "alcoholic".

The court said:

> The statute under attack, Code §18.1-200.1, lacks a definition of when a person is an alcoholic and it is unconstitutionally vague, uncertain and indefinite and is therefore void. It is a well settled

> principle of constitutional law that a statute must be definite to be valid and that if vague it denies due process of law. In Peacock v. Commonwealth, 200 Va. 464, 106 S.E.2d 659 (1959), we held a statute fatally defective in that it did not measure up to the constitutional requirements of definiteness and certainty.

The same salutary principles that govern the above holding in Hancock, where uncertainty prevailed in the definition of the act that was forbidden, apply in the instant case where uncertainty obtains as to the definition of the penalty so that one does not know and cannot know by specific definition whether an act constitutes a misdemeanor or a felony. Petitioner submits that under the language of the Section it can be conceivably urged that an act is both a misdemeanor and a felony, which obviously is fatally defective.

In Hancock, supra, the Court quoted from 50 Am.Jur. statutes, Section 472, page 484 in saying:

> The principle is stated thus: "In the enactment of statutes reasonable precision is required. Indeed, one of the prime requisites of any statute is certainty, and legislative enactments may be declared by the courts to be inoperative and void for

uncertainty in the meaning thereof. This power may be exercised where the statute is so incomplete, or so irreconcilably conflicting, or so vague or indefinite, that the statute cannot be executed and the court is unable, by the application of known and accepted rules of construction, to determine what the legislature intended, with any reasonable degree of certainty."

For the foregoing reasons, Petitioner submits that Section 54-524.104 either alone, in its uncertainty, or construed or read together with Section 54-524.106, lacks the preciseness constitutionally mandated in order to effect due process of law and should be declared unconstitutional.

V. THE REFUSAL OF THE VIRGINIA SUPREME COURT TO FOLLOW ITS OWN RECENT DECISIONS AND APPLY THE RULE OF STARE DECISIS DENIED PETITIONER THE RIGHT TO DUE PROCESS AND EQUAL PROTECTION OF THE LAWS IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

The Supreme Court of Virginia in the case of Reed v. Commonwealth, 213 Va. 593, 194 S.E.2d 746, decided March 5, 1973, had occasion to consider the sufficiency of the evidence to convict of the charge of conspiracy to distribute a controlled

drug. The present case involves a factual situation which is squarely on all fours with the case of Reed v. Commonwealth, supra, and based thereon McMullen's petition for writ of error to the Virginia Supreme Court should have been granted. It is Petitioner's contention that the failure of the Virginia Supreme Court to follow its recent decision in Reed, supra, and apply the doctrine of stare decisis denied Petitioner his right to due process of equal protection of the law.

The doctrine of stare decisis and the application of the doctrine is so well recognized and established that little comment need be made. Generally speaking, determination of a point of law by a court will be followed by a court of the same or a lower rank if a subsequent case presents the same legal problem, although different parties are involved in the subsequent case. Hertz v. Woodman, 218 U.S. 205, 54 L.Ed. 1001, 30 S.Ct. 621; Snidow v. Snidow, 192 Va. 60, 63 S.E.2d 620. The doctrine is not without application in cases involving penal statutes.

The decision in the Reed case was delivered per curiam and held that in order to convict the defendant of conspiring with another individual to distribute a controlled drug, "the Commonwealth had to prove beyond a reasonable doubt that an agreement existed between two men by some concerted action to distribute the drugs. Smith v. Commonwealth, 212 Va. 662, 187 S.E.2d 205 (1972)", Reed, supra, 194 S.E. 2d at 747. The evidence in Reed established that an undercover agent of the Virginia State Police along with a police

informer went to the defendant Reed and asked him "if he knew where we could score [buy] some acid [LSD] in Blacksburg.' Defendant replied, that 'if he could find the person he usually scored from, he knew we could score'." 194 S.E.2d at 746. Thereafter Reed in the company of the undercover agent and informer went to Blacksburg where they met a third party, Bowles. "The defendant asked Bowles if he had any 'acid'. Bowles responded that he had no 'acid' but that he had some mescaline." 194 S.E.2d at 747. The agent told Bowles he would like to make a purchase and together they drove to Bowles residence. There the agent and Bowles entered the house and the agent purchased seven LSD capsules. There was no showing that the defendant received any benefit from the transaction. Based on this evidence the Court held that the evidence was, as a matter of law, insufficient to prove an agreement to distribute a controlled drug.

It is Petitioner's contention that the Reed decision is controlling and that the evidence adduced in the instant case was likewise insufficient as a matter of law to prove an agreement to distribute a controlled drug. The evidence in this case established that the Petitioner was not present in the room at the time the sale took place; that the Petitioner did not have any conversation with the undercover agent at the time of the sales; that the Petitioner to the knowledge of the undercover agent never touched the drugs and never had possession of the drugs. (Tr.53) Indeed, there was no evidence and the undercover agent candidly testified

that he had no information of his own knowledge that Petitioner was in any way to receive any of the money for the drugs (Tr.56) or that he was in any way going to handle any of the drugs (Tr.57).

The evidence in the instant case goes further to establish a conspiracy to distribute drugs than the evidence in Reed v. Commonwealth, supra. On the contrary, the evidence in the two cases is identical in that the only connection that the defendant in each case had with the sale was the introduction of the agents to the dealer.

It would appear to Petitioner that statutes and case law should be followed in subsequent cases unless reason is given by the court for not following the precedent. In the instant case Petitioner and his counsel are unable to distinguish between the Reed case and the present case and cannot understand how the Virginia Supreme Court can differentiate the two cases no reason having been given therefor. If Petitioner and his counsel cannot rely upon statutory and case law in determining the status of the law with regard to charges of criminal conspiracy, Petitioner as well as the public in general will be unable to determine whether their conduct or proposed conduct constitutes or would constitute violations of the conspiracy laws. The law in these regards must be uniformly established in order that Petitioner and other citizens of the Commonwealth of Virginia can be informed and able to differentiate protected conduct from that conduct which is prohibited by law. To do otherwise is to deny

Petitioner the right to due process and equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States.

CONCLUSION

The Petition for Writ of Certiorari should be granted for the above reasons.

Respectfully submitted,

WALTER A. McMULLEN

/s/ Stanley E. Sacks
His Attorney

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APPENDIX A

VIRGINIA: IN THE SUPREME COURT OF VIRGINIA HELD AT THE SUPREME COURT BUILDING IN THE CITY OF RICHMOND ON WEDNESDAY THE 20TH DAY OF JUNE, 1973.

The petition of Walter A. McMullen, someties known as Walter A. McMullen, Jr., for a writ of error and supersedeas to a judgment rendered by the Circuit Court of the City of Virginia Beach on the 2nd day of November, 1972, in a prosecution by the Commonwealth against the said petitioner for a felony, having been maturely considered and a transcript of the record of the judgment aforesaid seen and inspected, the court being of opinion that there is no reversible error in the judgment complained of, doth reject said petition and refuse said writ of error and supersedeas, the effect of which is to affirm the judgment of the said circuit court.

A Copy,

Teste:

Howard G. Turner,
Clerk

By:
/s/Allen L. Lucy
Deputy Clerk

APPENDIX B

VIRGINIA: IN THE SUPREME COURT OF VIRGINIA HELD AT THE SUPREME COURT BUILDING IN THE CITY OF RICHMOND ON FRIDAY THE 7TH DAY OF SEPTEMBER, 1973.

Walter A. McMullen, etc.,
Plaintiff in error,
against Record No. R-15006
Commonwealth of Virginia
Defendant in error.

Upon a Petition to Rehear

On mature consideration of the petition of the plaintiff in error to set aside the judgment rendered herein on the 20th day of June, 1973, and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,

Teste:

H. G. Turner, Clerk

APPENDIX C

The Virginian-Pilot
Thursday, September 21, 1972
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CASE HISTORIES

Here is a tale of two ex-Marines.

David Etheridge is 23. He was found guilty by a Corporation Court jury in Norfolk Tuesday of selling drugs to an undercover policeman. Specifically, he was charged with selling Patrolman James A. Wakefield $20 worth of marijuana on March 27, $50 worth of LSD on March 29, and $35 worth of pentobarbital, a sedative on April 11. He was indicted in June and chose a jury trial when the case came to court this week.

He was convicted on each of the three charges and given the maximum sentence of 40 years, the sentences to run consecutively. This is a total of 120 years. His lawyer said that the verdict would be appealed.

Etheridge had told police that he had gotten hooked on heroin while serving in Vietnam. According to Lieutenant Lewis W. Hurst, the head of the Norfolk Narcotics squad, he was no a large-scale pusher, "just an average user."

Gerald L. (Les) Lavenstein Jr. is 24. He was chose from 750 other recruits as the honor man in his class at Parris Island in 1968. He also has gotten into trouble with drugs. He has been arrested three times and convicted of four offenses. On

September 13 he was given a 10-year suspended sentence by Circuit Court Judge Paul W. Ackiss in Virginia Beach, with the stipulation that he complete a drug rehabilitation program. He is to enter Rubicon, a controlled program in Richmond.

Although the prosecution argued that Lavenstein didn't deserve another break from the courts, since he was already on probation when he was arrested for the third time, Judge Ackiss said that it wasn't the court's purpose to put everybody in prison. "What good is five years there?" asked the judge.

And what good is 120 years there?